83

Supreme Court, U.S.
FILED
07 1035 DEC 6 - 2007
OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

RENE S. MERSWIN,

Petitioner,

v.

THE WILLIAMS COMPANIES, INC.,

Respondent.

On Petition for a Writ of Certiorari
to the United States District Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

RENE S. MERSWIN
1346 Cartwright Lane
Lawrenceville, GA 30045
(770) 962-3538
merswinr@bellsouth.net

QUESTIONS PRESENTED

This case involves race and national origin discrimination and retaliation in the context of an outsourcing contract that includes the transition of affected employees and skill sets to the new service provider and contractual relationship.

1. Whether a retaliatory conduct against an employee in a racial context can impair the right protected under 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991.

2. Whether the new Supreme Court standard for analyzing Title VII retaliation cases is applicable to retaliatory impairment under 42 U.S.C. § 1981.

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than those listed on the caption.

TABLE OF CONTENTS

QUESTION PRESENTED.....i
PARTIES TO THE PROCEEDINGS.....ii
TABLE OF CONTENTS.....iii
TABLE OF AUTHORITIES.....v
PETITIONER'S PRAYER.....1
OPINIONS BELOW.....1
JURISDICTION.....2
STATEMENT OF THE CASE.....2
REASONS FOR GRANTING THE WRIT.....11
CONCLUSION.....22
APPENDIX
The Circuit Order of 9/7/2007 .....1a
The Circuit Court Order and Judgment of 8/9/2007 .....3a
The District Court Opinion and Order of 12/04/2006.....12a

TABLE OF AUTHORITIES

CASES:

Burlington N. & Santa Fe Railway Co. v. White, *548 U.S. _ (2006)*.....16

Jones v. R.R. Donnelley & Sons Co., *541 U.S. 369 (2004)*.....16

FEDERAL STATUTES:

42 U.S.C. § 1981.....10

Civil Rights Act of 1991.....10

PETITIONER'S PRAYER

Petitioner Rene S. Merswin hereby respectfully requests that a Writ of Certiorari be granted to review the Order and Judgment of the United States Court of Appeals for the Tenth Circuit entered on August 9, 2007, affirming the Opinion and Order of the United States District Court for the Northern District of Oklahoma that was entered on December 4, 2006.

OPINIONS BELOW

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit is not published and is reproduced at Petitioner's Appendix ("Pet. App.") 3a-11a. The Order of the United States Court of Appeals for the Tenth Circuit denying the petition for rehearing en banc, entered on September 7, 2007, is reproduced at Appendix 1a-2a. The Opinion and Order of the United States District Court for the Northern District of Oklahoma, issued on December 4,

2006, is not published and is reproduced at Appendix 12a-53a.

JURISDICTION

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit was entered on August 9, 2007. A timely petition for rehearing en banc was filed on August 23, 2007 and denied on September 7, 2007. This petition is timely filed pursuant to United States Supreme Court rules 13.1 and 13.3. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254.

STATEMENT OF THE CASE

Petitioner Rene S. Merswin, an African-American, was hired on June 1, 1999 as a Systems Analyst by TWC and he was immediately offered extensive vendor training in Remedy technology as a full-time employee on the Remedy Support team. Petitioner holds the prestigious Certified Computing

Professional (CCP) designation from the Institute for Certification of Computing Professionals (ICCP), Des Plaines, Illinois, specializing in systems development and management with requirements for annual professional development. He also holds an MBA degree in management and a BS degree in business administration with a concentration in Information Systems from an American university. By the end of March of 2000, he had successfully completed seventeen days of vendor training in his specialty utilize Remedy technology and established himself as very valuable employee at TWC. In June of 2001, Petitioner was promoted to Sr. Systems Analyst. Addition to working as a Remedy Support person, Petitioner Merswin was also assigned by his manager in 2002 to receive on-the-job training in PVCS as a back-up support person.

A combination of subtle actions and statements by his supervisor, between July 2003 and December 2003, led him to suspect that he was being subjected to racial and cultural stereotype and unlawful discrimination. Petitioner wrote letter to his director (the supervisor's up-line) in October 2003 and had a fellow-up meeting with her in November 2003; and besides bringing his concerns of racial injustice to TWC HR department, Petitioner wrote a letter on January 14, 2004 to a senior vice president (SrVP) to request his assistance and voice concerns of limited opportunity due to racial stereotype. Upon the invitation of the SrVP, both men met for a breakfast in February 2004 for a time of coaching and encouragement.

Then TWC selected IBM in March 2004 for an outsourcing contract that would include the transition of affected employees and skill sets to IBM. And

depending on these employees' experience and expertise and the specific applications they supported up to that time, they would be classified by IBM a regular employee with full benefits and current seniority status or as a supplemental contractor with minimum or no benefits. All affected employees would also keep their TWC salaries and start dates as new IBM employees and contracts. Also in IBM's response to TWC's RFI in March 2004, it stated that it would utilize TWC's Problem Management system (Remedy) to help facilitate the ongoing service agreement if contracted.

In the midst of all these key developments and facts (e.g. Petitioner's internal complaints of racial discrimination, the perceived relationship with an African-American SrVP who was one of the key proponents for outsourcing contract, Remedy being rated as a top 5 or 10 most used application by TWC,

and IBM transition officers already began to plan the transition of affected employees at TWC site), petitioner's supervisor reassigned him from his primary role as a Remedy Support expert alleging (in TWC's Position Statement of June 2004 to the EEOC) that he needed to undergo an "accelerated" cross-training on PVCS because of the following allegation on the district court record[1]:

---

[1] "[W]hen a co-worker was absent from work due to short term disability, Mr. Merswin was unable to perform duties related to the PVCS Tracker/Version Manager application and had to frequently contact this absent co-worker for assistance. Therefore, cross training was accelerated for Mr. Merswin as well as for four others in the group."

Petitioner contends that for the sake of justice TWC should defend its questionable statement in front of a

reasonable jury, where the fact was that he was just awarded $5,000 in bonus at the beginning of 2004 in part for his excellent support work of PVCS.

Petitioner contends that those actions by his supervisor and others were intentional retaliatory actions to impair his right and influence how he would transition from TWC to IBM, and they ultimately led to his assignments as a Remedy Support employee being given to two Caucasian employees to become Regular employees with IBM to provide the contracted Remedy Support services to TWC. On July 1, 2004, Petitioner transitioned to IBM as a supplemental contractor and the two Caucasian employees were given regular employment with status with full benefits to provide the contracted Remedy Support services to TWC.

Petitioner contends that his letter of January 14, 2004 to the SrVP proved that he sought to be

promoted to a higher grade for his performance and superior qualifications; and he also gave his completed application and profile forms to TWC HR department with regard to the transition to and future opportunity with IBM. Petitioner contends that he has proved TWC distinct retaliatory actions that resulted because of his internal complaint: reassignment from Remedy while IBM was collecting information on primary support role on key applications; subjected to a last-minute "accelerated" cross-training in order to provide incomplete information to IBM regarding his current support role and expertise; removed or excluded his name from the key support provider personnel list provided to IBM. During the initial disclosure phase TWC listed Mr. Harry Green III, an African-American and key IBM transition officer, as a witness and he stated in his

Affidavit on the district court record that TWC did not identify[2] petitioner as a key contributor for Remedy:

---

[2] "[A]lthough it had been decided that Remedy was to be the problem management tool on the account, Rene was not identified as a key contributor by Williams and I decided to upgrade his employment status to long term supplemental employment (up to 18 months)."

During the transition those who chose to retaliate against him made certain he was given a short-term contractor's position. After the transition the African-American SrVP, one of two key TWC sponsors of the outsourcing efforts, recommended him to IBM for reconsideration, but his white subordinates (including one vice president) refused to work with the IBM project delivery executives at the TWC site to upgrade to his status to regular employee with full benefits. Petitioner contends that those who muddled with his

opportunity to become a regular IBM employee have clearly violated his right and privilege to benefit from this contractual relationship, involving all affected employees and their skill sets. *See* 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991[3]:

---

[3]

(a) "Statement of equal rights"

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, an shall subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

(b) "Make and enforce contracts"

"For purposes of this section, the term "make and enforce" includes the making, performance, modification, and termination of contracts, and the

enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

(c) "Protection against impairment"

"The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

REASONS FOR GRANTING THE PETITION

Petitioner filed this lawsuit in the district court on August 1, 2005; and after the court ruling on his motion for leave, he filed a Second Amended Complaint on March 6, 2006 to include violation of his civil rights under 42 U.S.C. § 1981 for both of his claims.

Petitioner contends the circuit panel also violated his right protected under 42 U.S.C. § 1981 to sue, be parties and give evidence when it sanctioned the misguided Opinion and Order written by TWC counsel in disregard for his civil rights as a United

States citizen. The opinion and order clearly states that "For the reasons set forth below, the Court grants defendant's motion for summary judgment." **Pet. App. 13a**. And the first reason listed is "Merswin is an African-American man who was raised in Suriname." **Pet. App. 14a**. Petitioner contends that there are people of African origins, born and raised in the Western hemisphere and outside the United States, who can be generally classified as "African-Americans" but they don't have the right protected by 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991. Petitioner argues that the 42 U.S.C. § 1981 statute protects his rights as a citizen within the jurisdiction of the United States, and that the circuit panel failed to analyze his race/national origin discrimination and retaliation case in the light of the "accepted and usual course of judicial proceedings." The only fact the panel restated correctly in its five-

page Order and Judgment, but out of context, was that "Mr. Merswin identifies himself as a "black, African-American male" from the country of Suriname." Pet. App. 5a. The panel went on to say that Petitioner's chief complaint is that "TWC failed to promote him to a higher grade level." Pet. App. 5a.

> "[T]he court explained that there was no evidence that the position to which Mr. Merswin referred was open, that TWC sought to promote any employee to that position, or that he had even applied for the job."

Petitioner respectfully objects to the panel assertion that "He attempts to bolster his complaint by alleging that he was forced to cross-train on an application known as PVCS Tracker, while a Caucasian employee was permitted to cross-train on his preferred application called Remedy Support." Pet.

App. 5a. The panel failed to state what part of "his complaint" it was referring to. As stated above, the district court record proves that there are two parts to Petitioner's complaint: (a) a failure-to-promote claim and (b) **the intentional discriminatory and retaliatory acts by TWC managers to limit his future opportunity in the light of all affected TWC employees transitioning to IBM**. Clearly, Petitioner's chief complaint is the two-part (b) section, which was the reason why he went to the EEOC office on April 27, 2004. Petitioner contends that, by most objective standards, he had above average qualifications and performance for his job responsibilities, but he was promoted only once in five years; and by April 2004, it was clear to him that the potential opportunity with IBM would be more promising for him as a minority employee. This is also confirmed by the original EEOC hand-written statement on Justification For

Categorization[4] on record. It is then clear that TWC's failure to promote him was not his chief complaint.

---

[4] "CP provided evidence of racial animus. CP most experienced in his work unit; Transferred to another unit at a time when jobs may be outsourced. If CP remained in his original unit he would the most senior employee."

Petitioner contends that the circuit panel was intentionally misguided by the district court's opinion and order that is written to link the last-minute reassignment from Remedy to disguise his core skill set (in Remedy and TelAlert technology) at a crucial time frame for 30 days and the so-called "accelerated" cross-training on PVCS to his failure-to-promote claim. But it does fit because a failure-to-promote situation has little to do with two actions or counts. Petitioner contends that those two confirmed actions, among others, were illegal conducts of intentional discrimination and retaliation to limit his

employment opportunity with IBM in a new contractual relationship, similar to the situation in *Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369 (2004).*

Petitioner contends that the district court in its adopted opinion and order refused to apply the Supreme Court ruling on retaliatory discrimination, and the district court and the tenth circuit appeared to be silence to the fact that a retaliation claim, in the context of an outsourcing contract involving the transition of affected employees, is cognizable under 42 U.S.C. § 1981 statute. Though the Tenth Circuit panel refused to analyze Petitioner's Title VII and 42 U.S.C. § 1981 retaliation claim according to the new standard in *Burlington N. & Santa Fe Railway Co. v. White, 548 U.S. _* (2006) ("White"), it apparently argued that Petitioner's retaliation claim failed because he relied on the same evidence to support

both of his claims. On the hand, the Tenth Circuit failed to review the judicial standard applied by the district court and offered the following and only statement on his retaliation claim. **Pet. App. 9a**:

> "[N]ext, the court explained that Mr. Merswin's retaliation claim likewise failed because although he had engaged in protected activity by filing an EEOC complaint, he did not demonstrate that he suffered adverse employment action as a result. The court noted that Mr. Merswin relied on the same evidence to support his retaliation claim and reiterated that TWC's act of assigning him to the PVCA Tracker application and another employee to Remedy did not constitute adverse action sufficient to sustain a claim of retaliation."

Petitioner argues that he has provided evidence and affidavits sufficient to bring his case before a reasonable jury whose members understand workplace issues. Petitioner argues that the court should focus on judicial proceedings and apply uniform standard to all cases. The district court made an unreasonable argument by linking Petitioner's protected activity to IBM conduct in stead of TWC's conduct in trying to establish the third element of his retaliation case. The questions presented in this case are important issues of civil rights. All persons within the jurisdiction shall have the right in every State and Territory. In *White* this Court clearly articulates the protection of employees' rights with regard to "who they are" ("i.e., their status") and "what they do" ("i.e., their conduct"). Before this court now is this petition that should be granted at least in the light of its current review of *CBOCS West, Inc. v. Humphries, No.*

06-1431 with regard to what rights employees have (i.e., their entitlement) in contractual relationships in the workplace and the reality of impairment.

The Supreme Court should grand the petition because the decision below conflicts with its decision in *White* on an important issue of work place injustice. Petitioner was subjected this type of retaliation two years before this Court set a reasonable standard in *White* to expose additional forms of intentional retaliation. In *White* this Court held that retaliation has occurred if the employer's action was materially adverse (or it produces an injury or harm) to dissuade a reasonable person in the employee's shoes from complaining about illegal discrimination. The same principle would apply for violation (or impairment) of the right protected under 42 U.S.C. § 1981.

The circuit court panel deliberately and erroneously affirmed the district court's holding that

in order for Petitioner to satisfy the third prong of his retaliation claim he must prove that TWC's conduct (or his protected activity) against him in 2004 "was in any way causally connected to IBM's decision to terminate him in March 2005." Petitioner disagrees with the following holding by the circuit court because effective retaliation does not always result in termination and TWC's conduct resulted in him having the full benefits of the new contractual relationship (*in quotes*). Pet. App. 46a:

> "[F]inally, plaintiff provides no evidence that TWC's conduct was in any way causally connected to IBM's decision to terminate him in March 2005. In the case of a retaliation claim, "[t]he causal connection may be shown by producing evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by

> adverse action." Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1320 (10th Cir. 1999) (implicitly overruled by National R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002), on other grounds); see Kendrick, 220 F.3d at 1234."

Next, the tenth circuit panel concludes in its Order and Judgment that this key argument by the district court and TWC counsel, among others, is accurate and complete. Pet. App. 11a.

> "[W]e agree with the district court's thoughtful analysis. It was detailed, accurate, and complete, leaving nothing for us to improve upon."

Petitioner respectfully objects to such holding of the tenth circuit and district court because it disregards the close temporal proximity between his complaints (protected activity) in January, February, April and/or

May 2004 and TWC's retaliatory conduct in April, May and/or June 2004. And instead of reviewing the causal link between Petitioner's protected activity and TWC's actions against him, this misguided Order and Opinion, apparently entirely written by TWC counsel, requires that he must provide "evidence that TWC's conduct was in any way causally connected to IBM's decision to terminate him in March 2005." This is an incorrect prima facie case for retaliation in regard to *White* and it is a significant departure "from the accepted and usual course of Judicial Proceedings."

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Signed this 5th day of December, 2007.

s/ Rene S. Merswin
RENE S. MERSWIN
Petitioner Pro Se
1346 Cartwright Lane
Lawrenceville, Georgia 30045
Tel 770-962-3538
merswinr@bellsouth.net

Petitioner's Appendix

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RENE SAWANIE MERSWIN,
Plaintiff-Appellant,
v.

THE WILLIAMS COMPANIES, INC.,
Defendant-Appellee.

ORDER

Filed September 7, 2007

Before TACHA, Chief Circuit Judge, MURPHY and HOLMES, Circuit Judges.

Rene Sawanie Merswin's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no

judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

s/Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RENE SAWANIE MERSWIN,
Plaintiff-Appellant,
v.

THE WILLIAMS COMPANIES, INC.,
Defendant-Appellee.

No. 06-5230

ORDER AND JUDGMENT*

Filed August 9, 2007

Before TACHA, Chief Judge, MURPY AND HOLMES, Circuit Judges.

Rene Merswin, appearing pro se, appeals the district court's dismissal of his complaint alleging that his former employer, The Williams Companies, Inc. (TWC), discriminated against him on the basis of race

and national origin, unlawfully retaliated against him, and created a hostile work environment in violation of 42 U.S.C. §§ 2000e through 2000e-17 and 42 U.S.C. § 1981. The district court granted summary judgment in favor of TWC, and exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

---

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Mr. Merswin identifies himself as a "black, African-American male" from the country of Suriname. Aplt. Br. at 4. He was employed by TWC as a systems analyst from June 1999 until July 2004 when TWC outsourced a portion of its information technology (IT) department to IBM. Following Mr. Merswin's termination, he was hired temporarily by IBM until March of 2005.

Mr. Merswin's chief complaint is that he suffered adverse employment action when TWC failed to promote him to a higher grade level. He attempts to bolster his complaint by alleging that he was forced to cross-train on an application known as PVCA Tracker, while a Caucasian employee was permitted to cross-train on his preferred application called Remedy Support. Mr. Merswin contends that cross-training on PVCA Tracker disadvantaged him during the transition to IBM and that when he complained of

these purportedly discriminatory acts, TWC retaliated by limiting his promotional opportunities and creating a generally hostile work environment.

Mr. Merswin filed a discrimination claim with the Equal Employment Opportunity Commission (EEOC) and then this action in the district court. The district court, however, in a well-reasoned order, determined that TWC was entitled to summary judgment because Mr. Merswin failed to make a prima facie showing of discrimination on either his failure-to-promote claim or his retaliation. The court also ruled that Mr. Merswin's evidence of a hostile work environment was insufficient to establish a valid claim, and hence summary judgment was proper on that count as well.

"We review a grant of summary judgment de novo, applying the same legal standards as the district court pursuant to Fed. R. Civ. P. 56 (c)." Dunbar v. Jackson Hole Mtn. Resort Corp., 392 F.3d 1145, 1147

(10th Cir. 2004). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See id. In determining whether there is a genuine issue as to any material fact, we examine the evidence and "reasonable inferences therefrom in the light most favorable to the nonmoving party." Id. at 1148.

On appeal, Mr. Merswin argues that summary judgment was inappropriate because he did, in fact, suffer adverse employment action and was subjected to a hostile work environment. But our review of the district court's order leads us to conclude otherwise. The district court first ruled that his failure-to-promote claim was unavailing because he did not suffer adverse employment action. The court explained that there was no evidence that the position to which Mr. Merswin referred was open, that TWC

sought to promote any employee to that position, or that he had even applied for the job. Further, the court discussed his allegations of being forced to cross-train on an application he viewed as unfavorable, but recognized that there was absolutely no evidence that he would have been retained either by TWC or IBM had he been permitted to work on Remedy Support, especially since he was already trained on that application. The court added that even if TWC's mandatory cross-training were sufficient to establish adverse action, TWC had articulated a legitimate, non-discriminatory reason for its policy: "By cross-training, [TWC] ensured that multiple employees were proficient with respect to each application such that work would not be compromised in case of an employee's absence." Aplt. App., Tab 67 at 14. Consequently, the court ruled that summary

judgment was proper on Mr. Merswin's failure-to-promote claim.

Next, the court explained that Mr. Merswin's retaliation claim likewise failed because although he had engaged in protected activity by filing an EEOC complaint, he did not demonstrate that he suffered adverse employment action as a result. The court noted that Mr. Merswin relied on the same evidence to support his retaliation claim and reiterated that TWC's act of assigning him to the PVCA Tracker application and another employee to Remedy did not constitute adverse action sufficient to sustain a claim of retaliation.

Lastly, the court examined Mr. Merswin's evidence of a hostile work environment, including instances in which he was offered a completely full bottle of water, taught "Oklahoma slang," and given McDonald's toys for his children. Id. at 4. The court also considered an

incident in which his supervisor refused to have fingerprints taken from a box that had been placed under his chair which contained the personal effects of a deceased co-worker. And the court accounted for an e-mail that had been circulated to Mr. Merswin and his co-workers relating a story about a woman's ill-founded fear of Michael Jordan and Eddie Murphy. The court addressed all this evidence, but concluded that it was insufficient to establish a claim for a racially hostile work environment. The court reasoned that the first anecdotes did not relate to race in any way, while the e-mail, "albeit light-hearted, highlights the problems associated with racial stereotypes." Id. at 18. The court acknowledged that the e-mail could have made Mr. Merswin feel uncomfortable, but ruled that his subjective belief was not enough to establish a hostile work environment.

We agree with the district court's thoughtful analysis. It was detailed, accurate, and complete, leaving nothing for us to improve upon. Therefore, having carefully reviewed the parties' briefs, the record on appeal, and the pertinent legal authority, we AFFIRM the district court's judgment for substantially the same reasons articulated in its order dated December 4, 2006.

Entered for the Court

Michael R. Murphy
Circuit Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RENE SAWANIE MERSWIN,
Plaintiff,

v.

THE WILLIAMS COMPANIES, INC.
Defendant.

Case No. 05-CV-0436-CVE-FHM

OPINION AND ORDER

Filed December 4, 2006

Now before the Court is Defendant's Motion for Summary Judgment (Dkt. # 47) and the Motion to Strike Portions of Selected Exhibits from Plaintiff's Summary Judgment Response (Dkt. # 66)[1]. Defendant, The Williams Companies, Inc. ("TWC"), moves for summary judgment on plaintiff's claims of race and national origin discrimination, hostile work environment, and retaliation in violation of Title VII

of the Civil Rights Act ("Title VII"), 42 U.S.C. § 2000e et seq., and 42 U.S.C. § 1981 ("Section 1981").

Plaintiff, Rene Sawanie Merswin ("Merswin"), appearing pro se, alleges that defendant limited his promotional opportunities on the basis of his race and/or national origin and retaliated against him as a result of his formal and informal complaints of discrimination. Defendant argues that plaintiff has not set forth a prima facie case of discrimination.

Additionally, defendant contends that it had legitimate, nondiscriminatory reasons for its actions and that plaintiff has failed to show that these proffered reasons are, in fact, pretext for illegal discrimination. For the reasons set forth below, the Court grants defendant's motion for summary judgment.

[1] The Court did not place substantial weight on the exhibits to which defendant objects. Since the Court grants defendant's motion, the inclusion of the exhibits at issue does not prejudice the defendant. Therefore, the motion is moot.

I.

Merswin is an African-American man who was raised in Suriname. He holds a bachelor of science degree in business administration and a master's degree in business administration. TWC hired Merswin on June 1, 1999 as a Systems Analyst in the Information Technology ("IT") Department. At this time, his supervisor was Alice Ann Hunter. On June 30, 2001, Merswin was promoted to Senior Systems Analyst. According to the TWC job summary for a Senior Systems Analyst, Merswin's job responsibilities included the translation of system requirements into technical design through

development testing and implementation in a timely, cost-effective manner. Dkt. # 47, Ex. D, Job Summary. According to plaintiff, his "actual job responsibility" was to provide "project/technical leadership on moderately complex projects" including Remedy and Tele Alert applications. Dkt. # 50, at 12.

On October 21, 2001, Merswin's Performance Evaluation Report indicated that he ranked himself higher than his supervisors, peers, and colleagues with respect to his job skills. Dkt. # 47, Ex. F. Whereas Merwin gave himself the highest score of "4" or "5" in ranking abilities such as leadership competency and integrity competency, other persons reviewing his work gave him average scores ranging from "2" to "4." Some of the comments at the end of the evaluation were negative. For example, one person commented that "Rene can become extremely defensive if he perceives that his competence is being

questioned." Id. In a November 4, 2001 email, Merswin implied that the poor results were, in part, due to his manager's discriminatory attitude. In describing his manager, he wrote, "she has a natural and professional weakness against people of colors." Dkt. # 47, Ex. G.

In 2002, Donna Hall ("Hall") became a manager in the IT Department at TWC; she had supervisory responsibility over Merswin. Dkt. # 47, Ex. E, Hall Affidavit, ¶ 3. At that time, Merswin was already trained in and provided Remedy and Tele Alert support. In 2002 and 2003, plaintiff received excellent performance reviews from Hall. Dkt. # 50, Ex. 21. Hall noted that Merswin had "exceeded expectations." Id. She noted that he had "taken on additional responsibilities of learning the PVCS products" and that he had improved his team skills. Id.

When Hall became manager, she required employees to cross-train "in order to become familiar with different applications to ensure that more than one employee supported each application." Id., ¶ 6. Hall contends that, while she gave each employee the option to select the application on which they would cross-train, "Merswin was the only employee who did not voluntarily select a new application to learn." Id., ¶ 8. However, Merswin claims that he asked to learn the IT Valuation Model application, but Hall refused. Dkt. # 50, at 15. Hall directed Merswin to train on the PVCS Tracker application. Dkt. # 47, Ex. E, ¶ 13. She assigned another employee, Jamie Blodgett ("Blodgett"), to work on the Remedy and Tele Alert applications. Dkt. # 47, Ex. E, ¶ 12. Hall created an Internal Systems Cross Training Worksheet to ensure that at least three employees were trained for each application. The worksheet listed Merswin as trained

for the Remedy, PVCS Tracker, and Tele Alert applications. Dkt. # 47, Ex. E, Attachment 1. It listed Blodgett as trained for Remedy, Tele Alert, and IVR applications. Id.

Beginning in June 2003, plaintiff claims that he was subjected to unfavorable discriminatory treatment that created a hostile work environment. He claims that, at that time, someone placed under his chair a box of "old stuff" that belonged to a former colleague who committed suicide in 2000. Dkt. # 50, at 27. While Hall allegedly witnessed this occurrence, she refused to have fingerprints taken of the box to determine who had placed it by plaintiff's chair. Id. Plaintiff also complains of Hall attempting to teach him Oklahoma slang and making comments that he was not an expert in Crystal Reports. Id. In his deposition, he pointed to other incidents that allegedly contributed to a hostile environment. For example,

plaintiff related an incident when Hall gave him McDonald's toys for his children and an incident when a co-worker gave him a "full" water bottle that he believed had been tampered with. Dkt. # 47, Ex. U, Merswin Deposition, at 73-76. In October 20, 2003, Merswin sent a letter to Barbara Kent ("Kent"), the Director of IT Applications, to "share information about [himself], because the desire of one or two people in the Infrastructure group is to end [his] employment at Williams." Dkt. # 47, Ex. I. Merswin met with Kent and told her that he was being discriminated against and that there were people "out to get him." Dkt. # 47, Ex. J.

On March 24, 2004, Merswin met with Linda Garhart ("Garhart"), a Human Resources Business Partner, and complained that Hall took Remedy assignments away from him to make him "vulnerable." Dkt. # 47, Ex. K. Merwin maintains that

Hall gave his Remedy assignments to Blodgett and continued to do so after his March 24, 2004 meeting with Garhart. Dkt. # 50, at 56. For example, on April 4, 2004, Hall cancelled a meeting between Merswin and an employee from PeopleSoft group to discuss a Remedy project; on the same day, Merswin saw Blodgett discussing the project with that employee. Id.

On April 9, 2004, Mewswin met with Hall to discuss his job goals. Dkt. # 47, Ex. M. Merswin listed one of his goals to "crosstrain with team members to gain additional knowledge and skills." Id. On the same day, Merswin met again with Garhart to discuss his belief that Hall was trying to "push him out" by assigning Blodgett to train on the Remedy application. Dkt. # 47, Ex. L. In his response to defendant's motion for summary judgment, plaintiff points to other "documented evidence of [his] removal from primary Remedy role." Dkt. # 50, at 57. Specifically, he points

to a May 2004 staff list that designated his role in the Remedy group as "secondary" and his role in the PVCS group as "primary." Dkt. # 50, Ex. 15, at 29. Additionally, he notes that Blodgett was given responsibility for training another employee on the Remedy application. Id. at 31. Merswin also contends that, on an undisclosed date, Blodgett accused him of "behaving as if he is above her." Dkt. # 50, Merswin Affidavit, ¶ 13.

Sometime in 2004, TWC employees learned that TWC planned to outsource some of its IT Department to another company. On April 14, 2004, Hall sent an email to various employees, including Merswin, indicating that TWC had "narrowed the field of potential outsourcing providers to one, IBM." Dkt. # 50, at 79. Hall's email quoted Michael Johnson ("Johnson"), TWC Senior Vice President: "From an employee perspective, we see the potential for

transitioned employees to have greater future opportunities with IBM." Id.

Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on April 27, 2004 alleging race and national origin discrimination. He claimed that he was "transferred to train on other software applications, while my less senior and less experienced non-black co-worker remained assigned to the same application." Dkt. # 47, Ex. N. The same day he sent an email to Johnson, Kent, and Ron Mucci, the Vice President of IT, claiming that he was forced out of Remedy work and required to cross-train on other applications. Dkt. # 47, Ex. O. In his email, Merswin claimed, "I am the Remedy Technical Lead/Architect by responsibility and efforts, but I am not being recognized because of co-workers' discomfort." Id. He maintained that "if was white [sic] and not foreign

born, I would at least be recognized by this time as a Systems Analyst Staff." Id. Merswin claimed that he had been moved from primary to secondary role in the Remedy application at a "critical time frame when IBM, the potential outsourcing vendor, may be talking to key application support people." Id. He claimed that Hall moved him to a secondary role "in order to give more visibility to another employee with less Remedy TelAlert experience." Id. Kent responded to Merswin's email on April 28, 2004, stating, "I am disappointed that you continue to believe that the circumstances surrounding the changes in our organization and the cross training taking place in your group is discriminatory . . . . We have tried to explain that the changes in our organization and the cross training efforts are in the best interest of the organization and to your benefit personally." Dkt. # 46,

Ex. P. Kent further noted that it was within plaintiff's right to visit with the EEOC. Id.

TWC signed a contract with IBM on June 1, 2004 to outsource most of its IT Department to IBM. TWC outsourced three hundred sixteen (316) out of five hundred fifteen (515) employees in the IT Department to IBM. Dkt. # 47, Ex. R, Nancy Gustine Affidavit, ¶¶ 2, 3. As part of the outsourcing process, TWC provided to IBM a list of Key Provider and Critical Support Personnel ("Key Provider List"). Dkt. # 47, Ex. R, Attachment 1. The Key Provider List included nineteen employees from Tulsa, Oklahoma; Merswin was not included in this list. Id. On June 19, 2004, Merswin sent an email to several TWC managers stating that "IBM Global Services would like to offer me regular employment for support at their Williams account, but IBM decision makers were not given the opportunity to do so." Dkt. # 47, Ex. V.

Plaintiff's employment with TWC terminated as of July 1, 2004, due to the outsourcing of the IT Department to IBM. Dkt. # 47, Ex. S. IBM thereafter offered him short-term supplemental employment as of July 1, 2004. On August 10, 2004, IBM offered plaintiff long-term supplemental employment commencing on August 16, 2004 and continuing for thirteen (13) to twenty-two (22) months. Merswin's employment with IBM ended in March 2005. In connection with the termination, he received a severance package and signed a form releasing IBM from any claims. Dkt. # 47, Ex. X.

II

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett,

477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Kendall v. Watkins, 998 F.2d 848, 850 (10th Cir. 1993). "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 317.

"When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (citations omitted).

In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Garratt v. Walker, 164 F.3d 1249, 1251 (10th Cir. 1998). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the [trier of fact] could reasonably find for the plaintiff." Anderson, 477 U.S. at 252. In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52.

III

In his second amended complaint (Dkt. # 24), plaintiff alleges that defendant discriminated against him on the basis of his race and national origin in violation of Title VII and Section 1981. He claims that

he suffered from an adverse employment action "when Remedy Support assignment was suddenly taken away from him and given to Ms. Jamie Blodgett when she falsely accused the Plaintiff that he 'is behaving as if he is above her.'" Dkt. # 24, ¶ 4a. Plaintiff claims that this constituted "an unlawful discriminatory act by the Defendant in order to limit and segregate the Plaintiff in such a way to deprive him from employment opportunity and adversely affect his status as an employee." Id. Plaintiff continues that, as a result of the discrimination, he was "prevented from becoming a regular employee with IBM when he transitioned as part of the outsourcing contract between Defendant and IBM." Id., ¶ 4b. Additionally, plaintiff contends that defendants created and tolerated a hostile work environment that caused plaintiff emotional pain and suffering. Id., ¶ 4c. Finally, plaintiff contends that defendant "influenced

the job transfer process to IBM" as a means of retaliating against plaintiff after his filing a discrimination claim with the EEOC and advising his superiors of alleged discrimination. Id. at 5.

In its motion for summary judgment, defendant interprets plaintiff's complaint to allege, in part, that he was discriminated against as a result of being terminated from TWC and outsourced to IBM. However, in his response, plaintiff states that he agreed that defendant made "the legitimate decision to outsource most of its IT Department functions and employees to IBM." Dkt. # 50, at 10. Plaintiff does "not challenge the defendant's rights to conduct reductions-in-force, layoffs or outsource of IT Department." Id. at 35. Plaintiff further notes, "the outsourcing to IBM provided a great opportunity for educated and experienced employees such as Plaintiff." Id. at 20. Thus, although his complaint is

not clear, plaintiff does not allege that the outsourcing itself constituted an adverse employment action; rather, plaintiff alleges that defendant impermissibly decreased his work on the Remedy application and permitted a non-black employee, namely Blodgett, to work on Remedy projects even though plaintiff was more experienced. This conduct, plaintiff alleges, was retaliatory in nature and was meant to prevent IBM from hiring plaintiff as a full-time, regular employee after the outsourcing. Additionally, plaintiff contends that defendants impermissibly failed to promote him on the basis of his race.

To survive summary judgment on his failure-to-promote and retaliation claims under Title VII and Section 1981, plaintiff must satisfy the McDonnell Douglas burden shifting analysis.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973); see also Patterson v. McLean Credit

Union, 491 U.S. 164, 186 (1989) (applying the McDonnell Douglas burden-shifting framework to claims under 42 U.S.C. § 1981); Perry v. Woodward, 199 F.3d 1126, 1135 (10th Cir. 1999) ("While McDonnell Douglas involved a Title VII claim for failure to hire, the analytical framework it pioneered applies equally to claims brought pursuant to section 1981."). First, plaintiff must establish a prima facie case of employment discrimination. McDonnell Douglas, 411 U.S. at 802. In the failure-to-promote context, plaintiff must show that he (1) belongs to a protected class; (2) was qualified for the promotion; (3) was not promoted; and (4) that the position remained open or was filled with a person in a non-protected class.[2] Amro v. Boeing Co., 232 F.3d 790, 796 (10th Cir. 2000). Plaintiff establishes a prima facie case of retaliation if he shows (1) he engaged in protected opposition to discrimination; (2) he was subject to

adverse employment action; and (3) a causal connection exists between the protected activity and the adverse action. Kendrick v. Penske Transp. Servs., Inc., 220 F.3d at 1234. Despite the slight variation depending on the nature of the adverse employment action alleged, "the critical prima facie inquiry in all cases is whether the plaintiff has demonstrated that the adverse employment action occurred under circumstances which give rise to an inference of unlawful discrimination." Id. at 1227 (internal quotations marks and citations omitted). If plaintiff establishes a prima facie case, a presumption of discrimination arises. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000).

Next, defendant must articulate a legitimate nondiscriminatory reason for the employment decision to rebut the presumption of discrimination. McDonnell Douglas, 411 U.S. at 803; Texas Dept. of

Community Affairs v. Burdine, 450 U.S. 248, 255 (1981); English v. Colorado Dept. of Corrections, 248 F.3d 1002, 1009 (10th Cir. 2001). At this stage, defendant need not rebut evidence established under the first step; it must only rebut the inference that it acted out of discriminatory animus. E.E.O.C. v. Flasher Co., Inc., 986 F.2d 1312, 1318 (10th Cir. 1992). The ultimate burden of proving discrimination remains at all times on plaintiff. Burdine, 450 U.S. at 253. If defendant carries its burden of production, the presumption of discrimination drops out of the case. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11 (1993).

---

[2] This Court recognizes that the Tenth Circuit cases "have sometimes articulated the prima facie case differently, particularly as to the fourth prong and whether it requires the plaintiff to show that the person promoted was outside of the

protected class to which the plaintiff belongs." Jaramillo v. Colorado Judicial Dep't, 427 F.3d 1303, 1307 n.1 (10th Cir. 2005).

Finally, the burden shifts back to plaintiff to show that defendant's stated nondiscriminatory reason is mere pretext for unlawful discrimination. Rivera v. City & County of Denver, 365 F.3d 912, 920 (10th Cir. 2004). To show pretext, plaintiff must produce evidence that would, if believed by the trier of fact, show that the true reason for the action was discriminatory. Plaintiff can produce evidence of "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted

nondiscriminatory reasons." Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997).

Here, plaintiff fails to establish a prima facie case that defendant failed to promote him on the basis of his race and/or national origin. Plaintiff contends that, given his 2002 and 2003 performance reports, he should have been promoted to the "Systems Analyst Staff grade level 22 or higher." Dkt. # 50, at 36. However, there is no evidence that the position to which plaintiff refers was open, that defendant sought to promote any employee to that position, or that plaintiff applied to that position. Plaintiff does not contend that another employee was impermissibly promoted to Systems Analyst Staff instead of plaintiff; rather, he merely argues that, given his experience and performance results, he should have been promoted to that position. Merely because plaintiff received good performance reports for two years does

not mean that he is entitled to a promotion, however.[3] His allegations, unsupported by any evidence that defendant sought to fill or promote any employee to Systems Analyst Staff or that plaintiff applied for that position, are insufficient to establish a prima facie case of discrimination.

---

[3] In fact, given plaintiff's relatively poor evaluations in 2001, there may have been good reason to deny him a promotion, even if the position of Systems Analyst Staff were open.

Linked to his failure-to-promote claim, plaintiff argues that defendant discriminated against him on account of his race because defendant gave a white employee, namely Blodgett, the lead position with respect to the Remedy application. Plaintiff argues that "Defendant segregated the Plaintiff in such a way to deprive him from leadership and employment opportunities" and "disciplined [plaintiff] . . . with a

so-called 'accelerated' cross-training." Dkt. # 50, at 42. Specifically, plaintiff was "forced" to cross-train under the PVCS Tracker application "in order to double time that Plaintiff would spend on PVCS security related emails and requests in order for him to spend less time on Remedy Support efforts." Id. at 29. By undergoing this accelerated PVCS training, plaintiff contends that he was pulled away from what he perceived to be the more desirable Remedy work. At the same time, defendant permitted Blodgett to work on Remedy-related projects.

The Court is perplexed by plaintiff's argument. Whereas most claims concerning discrimination in training hinge on a plaintiff's failure to receive training to the same extent as members of non-protected classes, here, plaintiff contends that the receipt of PVCS training was discriminatory. Plaintiff implies that, if he had been permitted to focus solely

on the Remedy application rather than learning the PVCS Tracker application, he would have been more valuable to IBM or would have been "flagged" on the Key Provider List. Plaintiff's argument is purely conjectural. There is absolutely no evidence that, had plaintiff not been trained in PVCS and permitted to work solely on Remedy and Tele Alert, TWC would have included plaintiff on the Key Provider List or that IBM would have retained him as a regular employee. Surely plaintiff cannot contend that defendant was under an obligation to ensure that he was the only employee trained in Remedy so as to increase his value to either TWC or IBM; such a notion is contrary to any rational business practice. Moreover, it is illogical to assume that plaintiff's additional training in PVCS Tracker somehow put him at a disadvantage with respect to his position at either TWC or IBM. In fact, the evidence clearly

indicates that the opposite is true. In his 2003 performance report, Hall noted, "Rene has also stepped up to the plate to take on additional responsibilities, such as learning [PVCS] Tracker. Exceptional feedback was received from the Tracker customers on how Rene managed the support while Mike Wolters was out of town for several weeks." Dkt. # 50, Ex. 21, at 19. TWC clearly and logically viewed training and proficiency in multiple applications as an asset, not a detriment.

Plaintiff has also failed to show that he was treated differently than other employees. TWC required each employee in the IT Department to train in multiple applications. Even Blodgett, the employee to whom plaintiff frequently points to show differential treatment, was trained in multiple applications. Plaintiff contends, however, that Blodgett was "promoted" to the primary Remedy technician, and he

was relegated to the secondary position. As evidence, he points to a computer staff list that states his role as "secondary" with respect to the Remedy group. Dkt. #47, Ex. 15. Also, plaintiff points to an email from Blodgett where Blodgett informed plaintiff that she had trained another employee, Dea Dildine ("Dildine"), on the Remedy application and requested that plaintiff provide Dildine with "more advance [sic] cross-training." Id.

Finally, he argues that Blodgett was treated more favorably than plaintiff because Hall moved plaintiff's one-on-one meetings from Mondays to Thursdays and kept Blodgett's meetings on Mondays. Dkt. # 50, at 28. It is unclear how Blodgett's email or Hall's decision to meet with plaintiff on Thursdays instead of Mondays provide any support for plaintiff's argument. Also, the mere fact that plaintiff was listed as "secondary" instead of "primary" with respect to the Remedy

application is insufficient to establish a prima facie case of discrimination. According to the Tenth Circuit, "a mere inconvenience or an alternation of job responsibilities" is not an adverse employment action sufficient to establish a prima facie case. Sanchez v. Denver Public Schools, 164 F.3d 527, 532 (1998).

Moreover, even assuming arguendo that plaintiff established a prima facie case of discrimination based on the training system, defendant has set forth a legitimate, nondiscriminatory reason for its employment action. Plaintiff argues that defendant discriminated against him by "forcing" him to cross-train in PVCS and permitting Blodgett to work on the Remedy application. However, defendant notes that the reason for this policy was "to ensure that more than one employee supported each application." Dkt. # 50, Ex. E, Hall Affidavit, ¶ 6. Plaintiff was assigned to PVCS training because he was already trained in

Remedy and Tele Alert. Likewise, Hall assigned Blodgett as an additional employee to support the Remedy application. Id., ¶ 10. Hall's Internal Systems Cross Training Worksheet is evidence of the company's policy of ensuring that multiple employees were trained on each application. Dkt. # 50, Ex. E, Attachment 1. The worksheet listed at least three employees who were responsible for each application. Id. With respect to Remedy, plaintiff, Blodgett, and Dildine were listed. Id. Defendant clearly had a rational and nondiscriminatory reason for cross-training. By cross-training, defendant ensured that multiple employees were proficient with respect to each application such that work would not be compromised in case of an employee's absence. Indeed, plaintiff was assigned to undergo "accelerated" training in the PVCS Tracker application because the primary employee responsible for that application was

absent for a substantial period of time due to a disability. Therefore, defendant's reason for requiring plaintiff to expand his knowledge beyond Remedy and Tele Alert was legitimate and nondiscriminatory. Plaintiff argues that the cross-training worksheet and defendant's policy of cross-training is mere pretext for unlawful race and national origin discrimination. He claims that the Internal Systems Cross Training Worksheet "was used to take work assignments away from Plaintiff." Dkt. # 50, at 16. Additionally, plaintiff states: "As an employee who holds MBA degree and he can distinguish a learning opportunity from abuse or pretext [sic]." Dkt. # 50, at 18. Plaintiff fails to provide any evidence to support these allegations of pretext. Mere assertions of pretext, without evidence, are insufficient to create a genuine issue of material fact. Celotex, 477 U.S. at 324; Shapolia v. Los Alamos National Laboratory, 992 F.2d 1033, 1039 (10th Cir.

1993) (noting that the plaintiff's mere assertions and own assessment of his job performance were inadequate to raise an issue of fact for trial with respect to pretext in a Title VII case).

In addition, the Court determines that defendant is entitled to summary judgment on plaintiff's retaliation claim because plaintiff has failed to establish a prima facie case of discriminatory retaliation. While plaintiff engaged in a protected activity by filing a complaint with the EEOC on April 27, 2004, plaintiff has not shown that he was subject to adverse employment action as a result of the protected activity. With respect to his retaliation claim, plaintiff points to much of the same evidence as described above. He argues that key Remedy assignments were taken from him and given to Blodgett and that he was "disciplined by Defendant with a so-called 'accelerated' cross-training for PVCS

Tracker as a back-up support person, in light of looming outsourcing, in retaliation for opposing discrimination." Dkt. # 50, at 46. For the same reasons as set forth above, the Court determines that the defendant's conduct in assigning Blodgett some Remedy work and training plaintiff in the PVCS Tracker application did not constitute an adverse employment action sufficient to establish a claim of retaliation.

Additionally, as in his failure-to-promote claim, plaintiff points to the fact that TWC did not include plaintiff's name on the Key Provider List. Plaintiff alleges that this action led directly to IBM's decision to terminate plaintiff in March 2005. Plaintiff contends that "plaintiff suffered materially when Defendant had identified Ms. Blodgett and Ms. Fairchild as Key Contributors for Remedy instead of Plaintiff who had proven himself over five years as a

senior Remedy Systems Analyst." Dkt. # 50, at 46. However, the Court notes that neither Blodgett nor Fairchild was included on the Key Provider List. Dkt. # 47, Ex. R, Attachment 2. Thus, it is unclear why plaintiff contends that TWC treated plaintiff differently from similarly situated employees, such as Blodgett, who were later retained by IBM. Ultimately, plaintiff provides no evidence, other than his personal views concerning his skills, that TWC should have included him on the Key Provider List or that TWC's exclusion from that list was due to racial animus.

Finally, plaintiff provides no evidence that TWC's conduct was in any way causally connected to IBM's decision to terminate him in March 2005. In the case of a retaliation claim, "[t]he causal connection may be shown by producing evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action."

Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1320 (10th Cir. 1999) (implicitly overruled by National R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002), on other grounds); see Kendrick, 220 F.3d at 1234. Here, plaintiff contends that "defendant began to systematically retaliate against Plaintiff after he met on July 8, 2003 with a senior vice president and voiced his concerns regarding opportunities for minorities at Williams." Dkt. # 50, at 47.

He filed his EEOC complaint on April 27, 2004. There is no evidence that, following this conduct, TWC engaged in any conduct that would persuade IBM to terminate plaintiff because of his race, national origin, or as a result of his protected conduct. On the contrary, IBM offered plaintiff short-term supplemental employment as of July 1, 2004; thus his employment was uninterrupted after the outsourcing.

IBM even offered plaintiff long-term employment commencing on August 2004. There is no evidence that plaintiff's ultimate termination from IBM in March 2005 was in any way linked to TWC's conduct or his protected activities in 2003 and 2004. Thus, plaintiff fails to establish a prima facie case of retaliation; defendant is entitled to summary judgment on that claim.

To the extent that plaintiff brings a claim for hostile work environment,[4] the Court grants summary judgment on that claim as well. "Although hostile work environment is not explicitly mentioned in Title VII, it is well established a victim of a racially hostile or abusive work environment may bring a cause of action pursuant to 42 U.S.C. § 2000e-2(a)(1)." Bolden v. PRC, Inc., 43 F.3d 545, 550 (10th Cir. 1994). To constitute actionable harassment, the conduct must be "sufficiently severe or pervasive to alter the

conditions of [the victim's] employment and create an abusive working environment." Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (internal quotation marks and citations omitted); see also Bolden, 43 F.3d at 550. Additionally, plaintiff must show that "the harassment was racial or stemmed from racial animus. General harassment if not racial or sexual is not actionable." Bolden, 43 F.3d at 500. Plaintiff must show "more than a few isolated incidents of racial enmity." Hicks v. Gates Rubber Co., 833 F.2d 1406, 1412 (10 Cir. 1987); Bolden, 43 F.3d at 550.

---

[4] It is unclear whether plaintiff brings a claim on the basis of a hostile work environment. In his response to defendant's motion for summary judgment, plaintiff states that he "has not made a separate claim for a hostile work environment from his discrimination and retaliation claims." Dkt. # 50, at 36. However,

plaintiff makes repeated references to a hostile work environment.

Here, plaintiff point to a few incidents that allegedly indicate a hostile environment and provide circumstantial evidence of racial discrimination. For example, the plaintiff recites an anecdote where a co-worker gave him a water bottle that was filled all the way to the top. Dkt. # 50, Ex. U, at 170-75. Also, plaintiff states that Hall gave plaintiff a bag of McDonald's toys for his five children and that she tried to teach him Oklahoma slang. Id. at 118-23, 138-39. Finally, plaintiff points to an email that Hall forwarded to plaintiff and other employees reciting a story about Eddie Murphy and Michael Jordan. Dkt. # 47, Ex. Y. The Court fails to see how the first several anecdotes created a hostile environment or relate in any way to racial animus. With respect to the Eddie

Murphy and Michael Jordan email, the Court determines that this did not create a racially hostile environment. While the email does concern race, it does not portray African-Americans in a negative light. In fact, the email, albeit light-hearted, highlights the problems associated with racial stereotypes. It is certainly possible that plaintiff felt uncomfortable as a result of this email; however, as a matter of law, plaintiff's subjective belief is insufficient to establish a claim for a racially hostile environment. Thus, plaintiff has failed to establish a genuine issue of material fact with respect to the allegedly racially hostile environment. Defendant is entitled to summary judgment on that claim.

To the extent that plaintiff merely points to these anecdotes to support his claims of discrimination in promotional opportunities and retaliation, the Court finds that these anecdotes do not alter its above

analysis. These anecdotes are not circumstantial evidence of either discriminatory failure-to-promote or retaliation.

IV.

The Court finds that plaintiff has failed to establish a prima facie case of race or national origin discrimination, both with respect to his failure-to-promote and retaliation claims. Plaintiff also fails to establish a genuine issue of material fact with respect to a hostile work environment. Therefore, defendant is entitled to summary judgment on all of plaintiff's Title VII and Section 1981 claims.

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment (Dkt. # 47) is granted, and the Motion to Strike Portions of Selected Exhibits from Plaintiff's Summary Judgment Response (Dkt. # 66) is moot. A separate judgment is entered herewith.

s/Claire V. Eagan

CLAIRE V. EAGAN, CHIEF JUDGE

UNITED STATES DISTRICT COURT

87

No. 07-1035

FILED
MAR 10 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

RENE SAWANIE MERSWIN

Petitioner,

v.

THE WILLIAMS COMPANIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

J. PATRICK CREMIN
Counsel of Record
MOLLY BIRCHER
HALL, ESTILL
320 South Boston Avenue
Suite 200
Tulsa, Oklahoma 74103
(918) 594-0400

Attorneys for Respondent

214576

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Petitioner has presented any compelling reasons to grant the Petition for Writ of *Certiorari*, or whether the Petition for Writ of *Certiorari* should be denied because the Petitioner has only presented his assertion that the Tenth Circuit and the District Court misapplied *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405 (2006), to his version of the facts in this case.

CORPORATE DISCLOSURE STATEMENT

Respondent, The Williams Companies, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Question Presented	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	iv
Introduction	1
Statement of the Case	2
Reasons for Denying the Petition	7
Conclusion	9

TABLE OF CITED AUTHORITIES

Page

Cases:

Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 126 S. Ct. 2405 (2006) ..... *passim*

CBOCS West, Inc. v. Hedrick G. Humphries, No. 06-1431 8

Statutes:

42 U.S.C. § 1981 .....1, 7, 8

42 U.S.C. § 1981a 1

42 U.S.C. §§ 2000e, *et seq.* 1

Rule:

U.S. Sup. Ct. R. 10 7

INTRODUCTION

This is a race and national origin discrimination and retaliation case, in which Petitioner, appearing *pro se*, alleges that Respondent limited his promotional employment opportunities on the basis of his race and national origin and retaliated against him as a result of his formal and informal complaints of discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981a ("Title VII") and 42 U.S.C. § 1981 ("Section 1981"). More specifically, Petitioner asserts that he was discriminated against on the basis of his race and national origin because he was asked to cross-train on different Information Technology applications and systems and taken off *Remedy* – his preferred application – shortly before Respondent outsourced its Information Technology Department to IBM. He further claims that he was retaliated against for filing an administrative Charge of Discrimination based upon this alleged discrimination. The District Court granted summary judgment for Respondent on Petitioner's claims, and the Tenth Circuit affirmed the District Court's granting of summary judgment.

Petitioner, as he has throughout this action, argues that neither the Tenth Circuit nor the District Court appropriately applied *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405 (2006) ("*Burlington*") to his version of the facts in this case. However, Petitioner has not set forth any dispute with *Burlington* in the Court of Appeals or with this Court, nor has he set forth any unsettled federal question. Rather, Petitioner simply argues that Tenth Circuit and

the District Court misapplied *Burlington* to the facts in this case. Simply put, Petitioner has wholly failed to carry his burden of demonstrating that there are compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

This case arises out of the termination of Petitioner's employment by Respondent as part of the outsourcing of Respondent's Information Technology Department ("IT Department"), which included Petitioner, to IBM. Petitioner was employed by Respondent as a Senior Systems Analyst on Remedy and Tele Alert applications in Respondent's IT Department.

In 2004, Respondent made the decision to outsource most of its IT Department functions and employees to IBM. Respondent outsourced three hundred sixteen (316) employees out of five hundred fifteen (515) employees to IBM, more than sixty percent (60%) of the entire department. As part of the outsourcing, Respondent provided a list of affected employees in each department to IBM, as well as a list of Key Provider and Critical Support Personnel. The list of Key Provider and Critical Support Personnel employees included only nineteen (19) total employees in the IT Department in Tulsa and did not include any employees on Petitioner's level in his group. IBM conducted interviews of the employees in the IT Department and made hiring decisions based upon its interviews. Respondent had absolutely no input into this process.

On July 1, 2004, Petitioner's employment with Respondent was terminated as part of the outsourcing of the IT Department – and him – to IBM. Petitioner was offered Short Term Supplemental Employment by IBM, and he commenced employment with IBM on July 1, 2004, thereby suffering no break in his continued employment. Petitioner received the same compensation with IBM that he had been receiving with Respondent and continued to provide support for the Remedy application. On August 10, 2004, Petitioner was offered Long Term Supplemental Employment with IBM. Petitioner's employment with IBM was terminated in March 2005, and, in connection with the termination, Petitioner was provided a substantial severance package from IBM and signed a form releasing IBM from any claims.

In this case, Petitioner alleged that he was "forced" to cross-train on different applications, which he claims resulted in him not being hired as a permanent employee by IBM. However, the cross-training on different applications was required by Petitioner's supervisor for all employees who reported to her as a benefit to both the employees and Respondent, and it seems axiomatic for Petitioner to argue that the cross-training somehow constituted discrimination against him.

Cross-training was required by Petitioner's supervisor in order to enable all of the employees reporting to her, including Petitioner, to become more familiar with multiple applications, thereby ***increasing*** their value in the event of an outsourcing. The cross-training effort was initiated in order to permit employees to gain additional skills as well as to fill a need for backup

support on certain applications and to ensure that more than one employee supported each application.

To ensure cross-training and backup on all applications, Petitioner's supervisor utilized an Internal Systems Cross Training Worksheet, which listed the different applications that employees in the IT Department supported and provided a primary analyst and at least one secondary analyst for each application. The assignment of a person as primary or secondary had nothing to do with seniority or who was the lead, but related only to who would be the first to be called by a client. The primary assignment was used by Petitioner's supervisor to increase the workload for individuals newly assigned to an application to provide them a sufficient volume of projects to be trained.

Most employees were trained in numerous applications, and most applications had more than one employee trained. However, Petitioner was Respondent's only employee who had been trained as an analyst on Remedy and Tele Alert, and he was adamant about remaining the sole individual on these applications. Petitioner's supervisor gave each employee the option to select the applications on which they would cross-train, but, of all the employees, Petitioner was the only employee who refused to voluntarily select a new application to learn. Petitioner's supervisor assigned another employee as primary analyst to work on projects on Remedy and Tele Alert along with Petitioner in order for her to cross-train and gain additional knowledge of the Remedy and Tele Alert applications. Furthermore, because Petitioner absolutely refused to voluntarily select a new application to learn, Petitioner's supervisor

directed him to train on the PVCS Tracker application in order to increase his skill set.

On April 27, 2004, Petitioner filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging race and national origin discrimination based upon his transfer from primary to secondary analyst on Remedy and being "forced" to cross-train. In this case, Petitioner alleges discrimination and retaliation on the basis of his race and national origin because he did not receive a promotion and was forced to cross-train on different applications.

Petitioner also alleges in this case, in a somewhat bizarre fashion, that he was the victim of some type of racial harassment while he was employed by Respondent. Petitioner alleged that he was the victim of harassment because, among other seemingly benign acts, his supervisor gave him a small gift (which he cannot remember) and a plastic bag of McDonald toys for his five (5) children and attempted to teach him "Oklahoma slang," a coworker gave him a "full" water bottle, someone placed under his chair a box of "old stuff" that belonged to a former deceased colleague, and he received a forwarded email with a story about Eddie Murphy and Michael Jordan (which did not portray African Americans in a negative light, but actually highlighted the problems associated with racial stereotypes). It has been unclear throughout this case whether Petitioner has brought a hostile work environment harassment claim under Title VII, or whether he has only offered such odd diatribes as "evidence" of pretext for discrimination. Regardless, the Tenth Circuit and the District Court held that Petitioner

has not established that he was subjected to a hostile work environment during his employment with Respondent.

On December 4, 2006, the District Court entered its Opinion and Order, dismissing Petitioner's claims of race and national origin discrimination, hostile work environment, and retaliation in violation of Title VII and Section 1981.[1] The District Court held that Petitioner failed to establish a *prima facie* case of discrimination based on Respondent's failure to promote him to a "Systems Analyst Staff grade level 22 or higher," as there is no evidence that the position to which Petitioner refers was open, that Respondent sought to promote any employee to that position, or that Petitioner applied to that position. (Pet. App. 35a). The District Court also held that Petitioner was not discriminated against based upon the cross-training on applications other than Remedy, as Respondent "clearly and logically viewed the training and proficiency in multiple applications as an asset, not a detriment" and Petitioner failed to show that he was treated any differently than other employees. (Pet. App. 39a). Regardless of whether Petitioner was able to establish a *prima facie* case of discrimination, the District Court also held that Respondent set forth a legitimate business reason for its cross-training in that Respondent's policy was "to ensure that more than one employee supported each application." (Pet. App. 41a). The District Court also held that Petitioner failed to

1. In his Appendix, Petitioner includes the opinions of the Tenth Circuit (Pet. App. 3a-11a) and the District Court (Pet. App. 12a-53a). In the opinions as provided in the Appendix, Petitioner has underlined and emphasized portions of the opinions that were not underlined or emphasized by the Tenth Circuit or the District Court.

provide any evidence sufficient to establish a retaliation or hostile work environment claim based upon his employment with Respondent. After the District Court dismissed Petitioner's claims, he then appealed to the Tenth Circuit. On August 9, 2007, the Tenth Circuit entered its Order and Judgment affirming the District Court's opinion.

REASONS FOR DENYING THE PETITION

The Petition should be denied because Petitioner has failed to carry his burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10. Instead, Petitioner simply argues that the District Court allegedly misapplied *Burlington* to his version of the facts.

In this case, Petitioner made the argument that his case should not be dismissed based upon the law as set forth by this Court in *Burlington*, but, when applying *Burlington* to the undisputed facts in this case, the District Court determined that Petitioner was unable to establish a *prima facie* case of retaliation and was unable to establish that Respondent's legitimate business reasons for "forcing" Petitioner to cross-train and/or failing to promote Petitioner were pretext for retaliation.

Petitioner appealed the District Court's opinion to the Tenth Circuit Court of Appeals, based again upon his interpretation of *Burlington*. The Tenth Circuit affirmed the District Court's opinion and held that Petitioner was unable to establish a claim of retaliation under either Title VII or Section 1981, based upon the law as set forth in *Burlington*.

Now, Petitioner has taken it one step further, and is requesting that this Court review the District Court's factual findings and the application of *Burlington* by the Tenth Circuit and the District Court to the facts in this case. Petitioner appears to argue that this Court should grant his Petition to determine whether the standard for a *prima facie* case of retaliation under Title VII as set forth by *Burlington* is the same for a claim under Section 1981. The question presented by Petitioner fails, for a multitude of reasons, to provide any basis for the granting of his Petition.

First, the Tenth Circuit and the District Court determined that Petitioner was not subject to retaliation based upon *Burlington* in the Title VII context, so, even were this Court to grant the Petition and hold that the standard for retaliation set forth in *Burlington* applies to Section 1981, the outcome by the Tenth Circuit and the District Court would not change.

Second, and more importantly, this Court is currently in the process of deciding whether a race retaliation claim is even cognizable under Section 1981 in *CBOCS West, Inc. v. Hedrick G. Humphries*, No. 06-1431. Obviously, if it is decided that there is no retaliation claim under Section 1981, then Petitioner's questions presented in this case with respect to the standard for a retaliation claim based upon Section 1981 become absolutely irrelevant. Further, even if it is decided that there is a retaliation claim under Section 1981, the appropriate standard – whether or not it is based upon *Burlington* – will then be set forth by this Court in that opinion.

As Petitioner has not presented any compelling reasons for this Court to grant his Petition, but has only argued that the Tenth Circuit and District Court misapplied *Burlington* to the facts in this case, the Petition should be denied.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

J. PATRICK CREMIN
Counsel of Record
MOLLY BIRCHER
HALL, ESTILL
320 South Boston Avenue
Suite 200
Tulsa, Oklahoma 74103
(918) 594-0400

Attorneys for Respondent

89

(3)

No. 07-1035

FILED
MAR 2 6 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

RENE S. MERSWIN,

Petitioner,

v.

THE WILLIAMS COMPANIES, INC.,

Respondent.

On Petition for a Writ of Certiorari
to the United States District Court of Appeals
for the Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

RENE S. MERSWIN
1346 Cartwright Lane
Lawrenceville, GA 30045
(770) 962-3538
merswinr@bellsouth.net

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

SUMMARY OF ARGUMENT.....1

ARGUMENT.....3

A. The Tenth Circuit Panel Sanctioning of the Lower Court's Departure from the Usual Course Judicial Proceedings Calls for an Exercise of this Court's Supervisory Power 3

B. Respondent's Argument and its Lack of Legal Substance Underscore the Necessity and Importance of this Petition before the Court.....10

CONCLUSION.....12

TABLE OF AUTHORITIES

CASES:

Burlington N. & Santa Fe Railway Co. v. White,
548 U.S. _(2006).....2, 4, 10, 13

Domino's Pizza, Inc., Et Al. v. McDonald, 546 U.S.
_(2006).....1

Jones v. R.R. Donnelley & Sons Co.,
541 U.S. _(2004).....2, 11

CBOCS West, Inc. v. Hedrick G. Humphries,
No.06- 1431.....1, 10, 12

FEDERAL STATUTES:

42 U.S.C. § 1981.....2

28 U.S.C. § 1391.....2

Civil Rights Act of 1991.....2

SUMMARY OF ARGUMENT

Petitioner files this Reply Brief to address Respondent's arguments in its Brief In Opposition. Petitioner argues that the lack of legal substance in Respondent's brief also underscores the necessity and importance for granting this petition to review the lower court's opinion and judgment. Respondent has not proved to this Court that the questions presented for review have ever been answered by this Court. Petitioner is cognizant of this Court's decision in *Domino's Pizza, Inc., Et Al. v. McDonald, 546 U.S. _(2006)* and the current review *CBOCS West, Inc. v. Hedrick G. Humphries, No. 06-1431.*

Petitioner argues that the pending review of *CBOCS West, Inc. v. Humphries, No. 06-1431* in the Supreme Court could or might have had a devastating effect on how circuit courts rule implicitly or explicitly in retaliation cases involving both Title VII and

Section 1981 claims. But Petitioner argues that his case clearly involves race and national origin discrimination and retaliation in the context of an **outsourcing contract** that includes the transition of affected employees and skill sets to the new service provider and **contractual relationship**.

Petitioner correctly argues in his petition that the District Court has refused to follow the ruling from the Supreme Court to review his retaliation claims in the light of *Burlington N. & Santa Fe Railway Co. v. White, 548 U.S. _(2006).* Petitioner intends to file a new case of race discrimination and retaliation pursuant to 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991 and 28 U.S.C. § 1391 before the expiration of the 4-year statute of limitations in a district court in the state of Georgia. *Jones v. R.R. Donnelley & Sons Co., 541 U.S. _(2004).*

ARGUMENT

Petitioner argues that the path to justice is so long and difficult for so many people in this great country. The evidence in this case is very clear and convincing, and Petitioner only wants to bring his case and evidence before a jury of reasonable citizens.

A. The Tenth Circuit Panel Sanctioning of the Lower Court's Departure from the Usual Course of Judicial Proceedings Calls for an Exercise of this Court's Supervisory Power.

1. The District Court entered an opinion and order on December, 4, 2006 that was clearly written by Respondent's counsel and not a Federal Court Judge, thereby avoiding its judicial duty to respond properly to a very important Civil Rights ruling from the Supreme Court. Petitioner raised this issue on appeal, but Respondent was silent on it. Petitioner does not question the lower court's discretion to adopt

respondent's proposed orders, but he would expect that the court to read all proposed opinions before signing and entering them, especially in the light of *White*. The lower court's deliberate decision to delegate its response to the Supreme Court ruling in *Burlington N. & Santa Fe Railway Co. v. White, 548 U.S. _ (2006)* to Respondent's counsel is a departure "from accepted and usual course judicial proceedings". At least, the lower court or Respondent's counsel admitted that Petitioner provided "documented evidence of [his] removal from primary Remedy role." (*See Appendix page # 20a*). In addition to a multitude of "documented evidence" combined with Petitioner's sworn affidavit, the court record also consists of Mr. Harry Green, III's affidavit of what he has witnessed during the transition process from the Respondent (The Williams Companies, Inc.) to IBM. On May 16, 2006, the parties met in Tulsa, OK and exchanged

documents requested. During Petitioner's deposition on September 6, 2006, Respondent's representatives acted in an inhumane and cruel way to damage his testimony and evidence. Petitioner believes that this Court will read the following exerts from the lower court's opinion and order (*petition Appendix pages 12a-53a*) and conclude that this was a terrible 19-page work of injustice by the author to fight against convincing and clear evidence in this case. (*portions highlighted for clarification*).

> "[I]n his response to defendant's motion for summary judgment, plaintiff points to other "**documented evidence** of [his] removal from primary Remedy role." Dkt. # 50, at 57. (App. P. 20a).
>
> "[H]owever, there is no evidence that the position to which plaintiff refers was open, that defendant sought to promote any

employee to that position, or that plaintiff applied to that position." (App. P. 35a).

"[H]is allegations, **unsupported by any evidence** that defendant sought to fill or promote any employee to Systems Analyst Staff or that plaintiff applied for that position, are insufficient to establish a prima facie case of discrimination." (App. P. 36a).

"[T]here is absolutely no evidence that, had plaintiff not been trained in PVCS and permitted to work solely on Remedy and Tele Alert, TWC would have included plaintiff on the Key Provider List or that IBM would have retained him as a regular employee." (App. P. 38a).

"[I]n fact, the **evidence** clearly indicates that the opposite is true. In his 2003 performance report, Hall noted, "Rene has also stepped up to the plate to take on additional responsibilities, such as learning [PVCS] Tracker." ***(App. P. 38a).***

"[A]s evidence, he points to a computer staff list that states his role as "secondary" with respect to the Remedy group. Dkt. #47, Ex. 15." *(App. P. 40a)*.

"[H]all's Internal Systems Cross Training Worksheet is evidence of the company's policy of ensuring that multiple employees were trained on each application. Dkt. # 50, Ex. E, Attachment 1." *(App. P. 42a)*.

"[W]ith respect to his retaliation claim, plaintiff points to much of the same evidence as described above." *(App. P. 44a)*.

"[U]ltimately, plaintiff provides no evidence, other than his personal views concerning his skills, that TWC should have included him on the Key Provider List or that TWC's exclusion from that list was due to racial animus." *(App. P. 46a)*.

"[F]inally, **plaintiff provides no evidence that** TWC's conduct was in any way causally connected to IBM's decision to terminate him in March 2005." ***(App. P. 46a).***

"[H]e filed his EEOC complaint on April 27, 2004. **There is no evidence that,** following this conduct, TWC engaged in any conduct that would persuade IBM to terminate plaintiff because of his race, national origin, or as a result of his protected conduct." ***(App. P. 47a).***

"[T]here **is no evidence** that plaintiff's ultimate termination from IBM in March 2005 was in any way linked to TWC's conduct or his protected activities in 2003 and 2004. Thus, plaintiff fails to establish a prima facie case of retaliation; defendant is entitled to summary judgment on that claim." ***(App. P. 48a).***

"[H]ere, plaintiff point to a few incidents that allegedly indicate a hostile environment and

provide circumstantial evidence of racial discrimination." *(App. P. 50a)*.

"[T]hese anecdotes are not circumstantial evidence of either discriminatory failure-to-promote or retaliation." *(App. P. 52a)*.

2. The Tenth Circuit panel sanctioned the flawed analysis of prima facie case of retaliation approved by the lower court instead of the correct standard set by another Tenth Circuit panel in response to the *White* ruling: "(1) she engaged in protected opposition to discrimination; (2) she suffered an adverse action that a reasonable employee would have found material; and (3) there is a causal nexus between her opposition and the employer's adverse action." *Antonio v. Sygma Network, Inc.*, 458 F.3d 1177, 1181 (10th Cir. 2006).

Then on August 7, 2007, another Tenth Circuit panel properly applied the same post *White* ruling or

standard in the court ruling in *Williams v. W.D. Sports, N.M., Inc., No. 05-2127* (10th Cir. 2007). So, Petitioner argues that the pending review of *CBOCS West, Inc. v. Hedrick G. Humphries, No. 06-1431* in the Supreme Court could or might have had a devastating effect on how circuit courts rule implicitly or explicitly in retaliation cases involving both Title VII and Section 1981 claims.

B. Respondent's Argument and its Lack of Legal Substance Underscore the Necessity and Importance of this Petition before the Court.

1. Respondent claims in its Brief in Opposition that "when applying *Burlington* to the undisputed facts in this case, the District Court determined that Petitioner was unable to establish a prima facie case of retaliation and..." But, according the court records, neither the lower court nor the Tenth Circuit panel even mentioned the *Burlington N. & Santa Fe*

Railway Co. v. White ruling in their respective opinions or judgments. Respondent's argument that the Tenth Circuit panel or the lower court applied *White* (assuming *Burlington* is *White*) to his Title VII claim is without any merit. It is not written in anywhere in the Tenth Circuit order and judgment or the lower court's opinion and order. The lower court's opinion focuses on *termination* from employment, while the *White* ruling recognizes that there are devastating retaliatory actions other than termination from employment.

2. Petitioner has clearly stated in his petition that the discrimination and retaliation actions to limit his employment opportunity with IBM in a new contractual relationship are similar (a 4-year statute of limitations) to the situation in *Jones v. R.R. Donnelley & Sons Co., 541 U.S. _(2004).* Petitioner intends to file a new case of race discrimination and

retaliation pursuant to 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991 and 28 U.S.C. § 1391 before the expiration of the 4-year statute of limitations in a district court in the state of Georgia.

3. Petitioner argues that his case is linked to *CBOCS West, Inc. v. Hedrick G. Humphries, No. 06-1431* with regard to his 42 U.S.C. § 1981 retaliation claim, but the Tenth Circuit panel failed to separate the claim in question from the Title VII retaliation claim. Therefore, **both** retaliation claims are before the Supreme Court for review for all the reasons stated above and in the original petition.

Finally, it would be inconceivable if a medical doctor has neglected to treat a premature **twin** because the survival of one of the two babies is questionable due to recent medical development or challenge relevant to his/her condition. In this current legal case, race retaliation under 42 U.S.C. § 1981 is

in question, but the panel of respected judges failed to recognize both retaliation claims in the light of the most recent ruling: *Burlington N. & Santa Fe Railway Co. v. White, 548 U.S. _ (2006).*

CONCLUSION

For the foregoing reasons, and those stated in the petition, the judgments of the Tenth Circuit and the lower court should be reversed.

Respectfully submitted,

Signed this 26th day of March, 2008.

s/ Rene S. Merswin
RENE S. MERSWIN
Petitioner Pro Se
1346 Cartwright Lane
Lawrenceville, Georgia 30045
Tel 770-962-3538
merswinr@bellsouth.net